Supreme Court of the United States.

No. 284, December Term, 1871.

THE TOWN OF GRAND CHUTE,

Plaintiff in Error,

vs.

GEORGE W. WINEGAR,

Defendant in Error.

BRIEF AND POINTS.

H L. PALMER,

Counsel for Defendant in Error.

Supreme Court of the U. S.

No. 284, December Term, 1871.—Writ of Error.

THE TOWN OF GRAND CHUTE,

Plaintiff in Error,

vs.

GEORGE W. WINNEGAR,

Defendant in Error.

This is a writ of error to the Circuit Court of the United States for the Eastern District of Wisconsin, to reverse a judgment therein recovered by defendant in error, George W. Winnegar, against the plaintiff in error, The Town of Grand Chute, for $21,906.82 debt, damages and costs entered on the 21st day of November, 1870.

The action was debt, upon nine bonds issued by The Town of Grand Chute to the Wolf River Branch Plank Road Company, or bearer, on the 12th day of March, 1855, eight of which bonds were for $1,000 each, and one of which was for $500, and also upon—

8 coupons or interest warrants for $88.35 each.
112 " " " 100.00 "
1 " " " 44.18 " and
14 " " " 50.00 "

The declaration contains a special count upon each bond and upon each coupon; a general count in debt for the whole amount due upon both bonds and coupons, and also the common counts.

The defendant first pleaded in abatement that at the time of the commencement of this suit, $5,000 of the bonds sued upon, and the coupons attached thereto, were held and owned by one Henry Hewitt, and the residue stated in the plea to be $3,000 with the coupons, were held and owned by Theodore Conkey. That Hewitt and Conkey were both residents of the State of Wisconsin, in which State the defendant below, The Town of Grand Chute, was situated. That they and not Winnegar, were the real parties plaintiff in interest in this action; that said bonds and coupons were not issued in good faith, or for any valid consideration, but were procured to be issued by fraud and deception and by collusion between said Hewitt and Conkey and one Reeder Smith, who was President and General Agent of the Plankroad Company, and in pursuance of a corrupt and fraudulent agreement whereby Hewitt received a contract from Smith on behalf of said company, for building five miles of the company's road at the extravagant price of $2,500 per mile, besides large extra compensation, and whereby Conkey was to pay the men employed by Hewitt out of his store at a large profit, and whereby Smith received $1,000 in said bonds as a personal compensation for a change in the location of a portion of the road already graded and ready for the plank, which change was mainly prejudicial to the interests of the people of the town and designed to advance the value of Conkey's lands; that Hewitt signed and delivered to the town a writing purporting to bind him to perform all the legal stipulations on his part contained in said contract; that said bonds, in pursuance of said agreement, were unconditionally transferred to said Hewitt in pretended part payment of said contract, before any work was performed or commenced; that the contract had never been in any particular performed by Hewitt, and that Hewitt and Conkey had caused this suit to be brought in the name of Winnegar in fraud of the equities of the plaintiff in error, and in fraud of the jurisdiction of the Court.

For plea see Record pages 110 and 111.

To this plea the plaintiff replied, and traversed each and every material allegation therein contained.

For replication see Record page 112.

The issue thus formed was tried by a jury, and found for the plaintiff upon the trial of the issue upon the plea in abatement; the defendant excepted to the charge of the court, and the plaintiff, by his counsel, upon the rendition of the verdict thereon, moved the court to enter final judgment, which motion was denied, and after the filing of pleas in bar, the plaintiff by his counsel again moved the court to strike off the pleas, and for final judgment upon the verdict on the pleas in abatement, which motion was also denied.

Record, page 121 and 129.

We proceed to consider the questions presented by the record at this stage of the case.

I.

There was no error in the instruction given by the court to the jury on the trial of the issue upon the plea in abatement. That instruction was the direction of the court to "the jury to find the issue for the plaintiff."

The defendant below held, or at least had the affirmative of this issue. No evidence, whatever, was offered to sustain the allegations of the plea in abatement except the deposition of the plaintiff Winnegar. The bill of exceptions shows that the testimony of Winnegar, contained in the bill of exceptions, "was all of the testimony introduced on said issue by either party."

Record page 129.

That testimony shows that Winnegar purchased the bonds of Goodwin, as the agent of Hewett, at the First National Bank of Union Springs, Cayuga county, N. Y., for $5,100, payable $2,500 in one year, and $2,600 payable in two years. That he had negotiated for the bonds a year and a half or two years before he purchased; that he purchased the bonds in January, 1870, purchased them for speculation; that he "had no reason to believe that they were any other than good and valid bonds"; that he "so believed at the time he made the purchase; that the purchase was made by him in good faith and without any knowledge or information that they were other than good and valid bonds;

that he, in equal good faith, gave his notes for the consideration, and that the notes would be met."

We have stated as we think the substance of all of the testimony of Mr. Winnegar material to the issue. The entire deposition is contained in the record, pages 128 and 129, and to it we invite the attention of the court. An examination of the deposition, however critical, will fail, we think, to disclose any testimony tending to sustain the allegations contained in the plea in abatement.

It follows then that the instruction of the court to the jury, to find the issue for the plaintiff, was proper and affords no ground for reversing the judgment below.

II.

The issue of fact joined on the plea in abatement having been duly tried and determined against the defendant by the verdict of the jury, terminated the case and entitled the plaintiff to final judgment. And final judgment having been claimed and insisted upon by the counsel for the plaintiff and refused by the Court, the plaintiff's right to it was not waived by the subsequent proceedings.

"If an issue of *fact* is joined on a plea in abatement, and found for "the *plaintiff*, *final* judgment is awarded in his favor; a rule which "extends to all *dilatory* pleas. The object of the rule appears to be to "discourage *false* dilatory pleas."

Gould's Pleadings, (3 Ed. 1849) p. 300.

The rule given by Mr. Chitty is to the same effect. He says: "If an *issue in fact* be joined upon the replication (*i. e.* to a plea in abatement) and found for the plaintiff, the jury should assess the damages, and the judgment is peremptory for the delay *quod recuperet* and not *quod respondeat.*"

1 *Chitty Pleadings*, 12 *Am. Ed. by Perkins*, 463, *Marginal paging* 465.
Graham's Practice, 752, 2d *Edition*,
Eichorn vs. LaMaisre, 2 *Wils.* 367.
Comyn's Digest, abatement, I. 14, 15.
Gilbert, C. P., 53, 1 *East* 542, 544.
2 *Saunders* 211, *N.* 3, 2 *B. & P.* 389.
1 *Lev.* 163, 1 *Vent.* 22, *Yelv.* 112.
T. Raymond 119, 1 *Lord Raymond* 594.

If, as we claim, the plaintiff was entitled to final judgment by reason of the fact that the issue joined upon the plea in abatement was found in his favor by the jury, then it is submitted that the plaintiff has now only the judgment which was then his right; and that the subsequent proceedings, and trial down to the entry of judgment were simply void. If this be so it follows that the judgment below should be affirmed notwithstanding error may have occurred in such subsequent proceedings.

III.

The defendant then pleaded nine separate pleas, and the plaintiff moved the Court to strike off the second and eighth.

Record, p. 121.

This motion was granted by the Court.

Record, p. 122.

This was not error.

1. The first plea was *nil debit* and the second was *not est factum*. That these pleas were inconsistent and not authorized by the practice of the Federal Courts, we suppose will be conceded.

If two pleas are filed substantially the same, the Court on motion will order the last one to be stricken out as improperly incumbering the record.

Varnum vs. Campbell, 1 *McLean* 313.

Nul til Record and *nil debit*, pleaded and one ordered to be stricken off;

Le Comte vs. Pendleton, 1 *Johnson's Cases* 104.

Gould's Pleadings, *p.* 428, 429.

Ex parte Davenport 6 *Peters* 661.

In this case in a suit upon a Custom House bond the defendant had pleaded *non est factum* and tende:. The District Court, on motion, ordered the plea of tender "to be struck from the docket as a nullity." An application was made to this Court for a *mandamus* directing the District Judge to restore the plea of tender to the record. This Court, per Story Judge, said: "As the allowance of double pleas and defences "is not a matter of absolute right, but of discretion in the Court, and "as the Courts constantly exercise a control over this privilege, and "will disallow incompatible and sham pleas, no *mandamus* will lie to "the Court for the exercise of its authority in such cases, *it being a* "*matter of soand discretion exclusively appertaining to its own* "*practice*."

If it rested in the discretion of the Court below to determine whether the two incompatible and inconsistent pleas, pleaded in this case, should stand or not, and in the exercise of such discretion the Court below ordered one of them to be stricken off, the action of the Court in the premises was not error, and it is submitted is not properly the subject of review here.

The motion to strike out was the proper remedy, and was in accordance with the approved practice in such cases.

Noonan vs. Bradley, 9 *Wallace* 394, 402,

IV.

The plaintiff's motion to strike off the eighth plea was properly granted. This plea is in substance the same as the plea in abatement. The gist in each plea is that the bonds were held and owned by Henry Hewett and Theodore Conkey; that they and not the plaintiff were the real parties in interest; and that the bonds were issued without consideration, and were procured to be issued by fraud. The only difference between the two pleas consists in the fact that in the eighth plea the facts alleged to constitute the fraud are set forth more fully and at length. These matters having been disposed of by the trial upon the plea in abatement, it is submitted that the subsequent plea of the same subject matter was clearly frivolous, and that the order striking off the plea was

properly made under the 44th rule of court, which provides that "false or frivolous pleas or demurrers will be struck off on motion."

For plea in abatement see Record, p. 110.

For eighth plea see Record, p. 116, *et sequitur*.

V.

The "Third," "Fifth," "Seventh" and "Ninth" pleas were demurred to, and the demurrer was sustained.

1. Third plea, Record, p. 114.

This plea alleged that the Act of February 10, 1854, authorizing the Town of Grand Chute to subscribe for plankroad stock and issue bonds in payment, "was not published pursuant to the constitution and laws "of said State of Wisconsin, at or prior to the time of the calling, "holding and canvas of the special election prescribed by said act "to-wit: on the 20th day of May, 1854."

The question raised by the demurrer to this plea, was determined by this Court in the case of

Havemeyer vs. Iowa County, 3*d Wallace* 294.

It was again raised and fully discussed in the complainant's Brief in *Beloit vs. Morgan*, 7 *Wallace* 619, but the former ruling of the Court was not disturbed It may be considered to be the settled doctrine of this Court that Acts of the nature of that under which the bonds in question were issued and which this Court said in Havemeyer vs. Iowa County was "in all respects identical with the one under which the securities in that case were issued," are private Acts, and their publication is not necessary to the validity of the securities issued under them.

2. Fifth plea, Record, p 14.

This plea alleges that the "Board of Directors of the Winnebago "Lake and Fox River Plankroad Company did not, nor did the Board

"of Directors of the company mentioned in said declaration at or before "the time of the supposed subscription to the capital stock of the said "company, declare the amount necessary for the completion of the "road of said company in manner and form as prescribed by said Act "of February 10, 1854."

In section 1, of the act of Feb. 10, 1854, Record page 130, see also said act in appendix, it is provided that the towns therein named, under the conditions and restrictions therein contained, may subscribe to the capital stock of said Plank Road Company "such amount not ex- "ceeding ten thousand dollars for any one town, as may be declared "by the Board of Directors of said Company necessary for the com- "pletion of said road." This language can only be regarded as merely directory, and the declaration here mentioned was only one of the details to be observed in the proceedings connected with the making of the subscription to the stock and the issue of the bonds. The act of Feb. 10, 1854, as we contend, granted ample power to the town to make a subscription to the stock of the company and issue bonds in payment, upon certain conditions. The declaration sets forth all the facts necessary to a recovery, viz., the issuance of the bonds pursuant to chapter 40 of the private laws of 1854. The agreement by the board of supervisors to subscribe the sum of ten thousand dollars to the stock of the Wolf River Branch Plank Road Company, and authorizing the chairman of the board to issue the bonds mentioned in the declaration, under the seal of the town in payment therefor; That such bonds were issued for the purpose of carrying out the provisions of said act, and in accordance with the resolutions of the board of supervisors, that the company sold the bonds for a valuable consideration to *bona fide* holders, and the same pas[illegible]om hand to hand in the stock markets, like other negotiable securities, and as such came to the hands of the plaintiff, who is now the lawful owner, holder and bearer thereof. All these facts are practically admitted by this plea, at least they are not traversed by it. It is not therein alleged that the plaintiff is not a *bona fide* holder of the securities, that he purchase them after due, dishonored, out of the usual causes of trade, for an insufficient consideration, or that he had any knowledge of any irregularity or defect in the proceedings anterior

to or connected with their issue. No other facts than those set forth in the declaration, and as we say confessed by this plea, were necessary to make the issue of the bonds regular,—and the plea is bad in substance.

Again, the law being in force, authorizing the town, under the circumstances, to issue the bonds, it is no defence to either the bonds or coupons in the hands of a *bona fide* holder, that the bonds were issued irregularly, or that some of the directions of the act were not strictly followed, or were altogether omitted. Such facts constitute no defence, and the fact that the plaintiff is a *bona fide* holder being cofessed by the plea, the plea is for these reasons bad in sustance.

Com'rs Knox Co., vs. Aspinwall, 21, *Howard* 539.
Meyer vs. Muscatine, 1, *Wallace* 384.
Mercer County vs. Hacket, 1, Wallace 83.

Seventh Plea. Record, p. 15.

This plea alleges that no special election, such as is prescribed by the Act of February 10, 1854, was called or held previous to the issue of the bonds.

This plea, like the last, fails to show that the plaintiff had any knowledge of the fact here alleged, or to impeach in any way the plaintiff's character of a *bona fide* holder of the bonds and coupons. Whether the election was held at all; when it was held; what was its result; when the town subscribed for the stock; in what manner or under what agreement between the town and the company the subscription was

made, are all facts *in pais*, by which the purchaser is not affected, unless he is shown to have had actual notice before he purchased the bonds.

See authorities cited to last point

4. Ninth Plea. Record, page 119.

This plea alleges that the bonds were not executed and delivered to the Wolf River Branch Plankroad Company for the purpose of carrying out the provisions of any Act of the Legislature, or for a valid consideration. That the Plankroad Company did not sell the same to *bona fide* holders for a valuable consideration; that the same have not passed from hand to hand like other negotiable securities, and had not as such come to the hands of the plaintiff: that they are a part of ten thousand dollars of bonds procured to be issued by fraud and deception, and by collusion between Conkey, chairman of the Town Board, Smith, President of the Plankroad Company, and Hewitt, a contractor, and divers other persons, and in pursuance of a conspiracy for the purpose of defrauding the defendant and the creditors and stockholders of the Plankroad Company, and contains other allegations of the same general character.

This plea also fails to state any facts tending to show that the plaintiff was not a *bona fide* holder of the bonds in question or that he did not pay a valuable consideration for them or that he had notice of any of the facts alleged in this plea. The plea therefore constitutes no defence to the action, and the demurrer to it was properly sustained.

See authorities above cited

VI.

The counsel for the defendant objected to any and all evidence offered on the part of the plaintiff, for the reason that on the pleadings in the case, and under the law by which the plaintiff claims that the bonds and coupons were issued, the plaintiff was not entitled to recover against the defendant.

Record, page 130.

It is not entirely clear, precisely what question it was intended to raise by this objection, or what obstacle, if any to the plaintiff's right to recover, was disclosed by the pleadings and the law under which the bonds and coupons sued upon were issued.

It is certain that the declaration was good both in form and substance, and stated causes of action against the defendant arising upon the several bonds and coupons counted upon, and that issues had been joined upon it and the several special pleas which remained upon the record. The testimony offered was "pertinent to the said issues," as the bill of exception states, (p. 130.) It consisted of the bonds and coupons described in, and copies of which were annexed to the declaration, proof of the amount due on the bonds and conpons for principal and interest, and the several acts of the Legislature of the State of Wisconsin empowering the town to issue the bonds. It is difficult to perceive any reason why the "testimony and evidence" thus offered ought to have been excluded or wherein the court below erred in overruling the objection and allowing the evidence to go to the jury.

The Acts of the Legislature read in evidence, arranged in chronological order, were as follows:

1. An Act of the Territorial Legislature entitled, "An Act to incorporate the Winnebago Lake and Fox River Road Company." approved March 13, 1848; a copy of which at length is printed in the appendix to this brief, commencing page 2. This act created a corporation by the name of the President and Directors of the Winnebogo Lake and

Fox River Road Company; clothed it with the power to construct a plank road from Winnebago Lake to the foot of the rapids of the Grand Kankalin in Fox River, and authorized a capital of fifty thousand dollars.

2. Chapter 72, Laws of Wisconsin, passed February 15th, 1851, entitled "An Act to amend an Act entitled, an Act to incorporate the Winnebago Lake and Fox River Road Company.

See Appendix, p. 6.

This Act authorized an increase of the capital stock to $100,000 "for the construction of a branch extending to the Wolf River to commence at such point on the Winnebago Lake and Fox River road and terminate at such point on the Wolf and Wisconsin Rivers, as said company should judge best;" provided that when five hundred shares of stock should be subscribed for the "construction of the Wolf River Branch Road" and one dollar on each share paid, the said company should be empowered to act, and was thereby authorized to construct said branch under the same regulations, liabilities, restrictions and privileges as those specified in the Act thereby amended. By section 3 the company were authorized to keep separate books for the "Wolf River Branch Road," and "to declare dividends, and that all stock issued for the same" should be "the stock of the Wolf River Branch" of the Winnebago Lake and Fox River Road, and that they might have and were thereby authorized to create, at their discretion, a separate Board of Directors, and to have a President, Secretary and Treasurer for said branch, to be created by the stockholders in said branch. This Act, it will be seen, practically created a new corporation to construct, manage and enjoy the "Wolf River Branch Road," which was thereby severed from and rendered in all respects distinct and separate from the road of the Winnebago Lake and Fox River Road Company

3. The act of February 10, 1853, chapter 16, of the laws of that year, which changed the name of the Winnebago Lake and Fox River Road Company, to the Winnebago Lake and Fox River *Plank* Road Company.

Appendix, p. 6.

4. Chapter 40, of the private laws of 1854, an act to authorize the towns therein named to subscribe for Plank Road Stock. Sec. 1, of this act authorized the town of Grand Chute, among others, to subscribe to the capital stock of the Wolf River Branch of the Winnebago Lake and Fox River Plank Road Company, to an amount not exceeding $10,000, and pay for the same in the bonds of the town so subscribing payable in fifteen years from date, with interest at a rate not exceeding ten per cent.

This act further provided that a tax should be annually levied and collected to pay the interest and ultimately the principal of the bonds so issued; pledged the stock issued to the town and the dividends accruing therefrom, irrevocably for the payment of the bonds, principal and interest; authorized the supervisors of the town to appoint annually a Road Stock Commissioner, who should attend all the meetings of the stockholders of said company and cast one vote for each share of stock held by the town, and authorized such commissioner or some other person to perform the same duty in case of his inability to attend.

Section six prohibits the issue of bonds by any town, under said act, unless a majority of the votes cast on that question at an election held for that purpose, should be in favor of the same.

Section seven provides for holding such election, the manner of conducting it and canvassing of the votes cast thereat.

Appendix p, 1.

Chapter 69, of the Private Laws of 1854, entitled "An Act to amend an act to incorporate the Winnebago Lake and Fox River Plank Road Company." This act was approved Feb. 21, 1854, and made the stockholders on the Wolf River Branch of the Winnebago Lake and Fox River Plank Road Company, a corporation by the name of the "President and Directors of the Wolf River Branch Plank Road Company," with authority to construct and maintain a plank or turnpike road from Appleton to Stevens Point, on the Wisconsin River, and the act further provided as follows, "and they shall at all time have all

"the rights and privileges secured in the charter to which this is amend-
"atory," and that all stock issued in said company should be the stock of the "Wolf River Branch Plank Road instead of Wolf River Branch of the Winnepago Lake and Fox River Road Company."

Appendix, p. 7.

1. It will be seen by these several Acts that the Winnebago Lake and Fox River Road Company was incorporated March 13, 1848, and was authorized to construct a road from Lake Winnebago to the foot of the Rapids of the Grand Kakalin, in Fox River. This was a road running from Lake Winnebago northerly along the Fox River, a distance of about 10 miles.

By Chapter 72 of the Laws of 1851, the company was authorized to increase its capital and construct a branch to commence at a point on the road authorized by the charter, and to terminate at such point on the Wolf or Wisconsin River, as the Directors might determine. This was designated in the last mentioned Act as *The Wolf River Branch Road*, and separate stock for this branch road, and a separate Board of Directors for its management was provided for by said Act.

The Act of February 10, 1854, Chap. 40, was passed for the purpose of authorizing the several towns named in it to aid in the construction of this Wolf River Branch, and conferred no authority whatever to aid the construction of the other line along Fox River. The towns named were situated along the route of the branch extending from Fox River to the Wolf and to Stevens' Point on the Wisconsin, and none of them except the defendant, touched the other line. It was the stock of the Wolf River Branch to which the several towns named in the Act were authorized to subscribe. This stock was separate and distinct from the other stock of the old company, and the Wolf River Branch Road had a separate organization as we have shown by the Act of February 15, 1851.

Ten days after the passage of the aid law, the same legislature which passed it, also passed Chapter 69 of the Law of 1854, by which the separate organization of the Wolf River Branch was created a separate

and distinct corporation in form and name, as it already was in substance, and all the rights acquired under the old charter were saved to and confirmed in the nominally new corporation thus created. Can it be doubted upon an examination of this legislation, that both the Legislature and the people of the Town of Grand Chute, and the other towns named in the Act of 1854, intended to aid the construction of the Wolf River Branch Plank Road running westerly from the Fox River in Grand Chute to the Wolf and thence to the Wisconsin River? Can it be pretended that the subscription to the stock of the Wolf River Branch Plank Road Company, was, in view of this legislation, unauthorized? It seems to us not, and if not, it is insisted that, here is an end to this case and the judgment below must be affirmed

The town was authorized by law to subscribe for the stock of the Plankroad Company. It did so subscribe. It was authorized by law to pay therefor in such bonds as are involved in this suit. It did so pay its subscription and receive its stock. The town has had the full benefit of its subscription. It has the road. It has the stock It has never returned or offered to return the consideration for which the bonds were issued. The town is now estopped from asserting that the bonds were improvidently or irregularly issued.

The public have trusted them upon the faith of the law, and their own recitals of facts contained in their bonds. They have had the full benefit of the money drawn from the public, and they will not now be heard to say that they have themselves been guilty of some laches, irregularity, fraud, or rascality, among and between themselves, of which the public was ignorant, and are therefore excused from performing the contract on their side.

Bushnell vs. Beloit, 10 *Wis.*, 200.

Knox Co. vs. Aspinwall, 21 *Howard*, 545.

Mercer Co. vs. Hacket, 1 *Wallace*, 83, 95, 96.

Havemeyer, vs. Iowa Co., 3 *Wallace*, 294.

Moran vs. Miami Co., 2 *Black*, 722, and cases cited in the opinion of the court.

Zabriskie vs. Cleveland, C. & C. R. R., 23 *Howard*, 381.

Amey vs. Alleghany City, 24 *Howard*, 364.

It follows, that the several laws, bonds, and coupons, and computation of interest thereon, were properly admitted and read in evidence

VII.

The remaining question aiming upon the trial and presented by the Bill of Exceptions we think requires but a passing notice.

The only remaining pleas on the Record are the 1st, *Nil debit* the 4th, that the town was not authorized to subscribe to the stock of the Wolf River Branch Plank Road Company, but to the capital stock of the Wolf River Branch of the Winnebago Lake and Fox River Plank Road Company, and the 6th that the defendant on the 29th of January 1855, subscribed for $10,000 of the capital stock of the Wolf River Branch Plank Road Company and issued its bonds thereto; that they were afterwads negotiated by said company and the authority to issue bonds was thereby exhausted. To this plea the plaintiff replied that the bonds issued on the 29th of January 1855, were surrendered to the defendant and canceled on account of a supposed informality, and that the defendant being duly authorized by law issued the bonds in suit in lieu of them. A Demurrer to this Replication was overruled, but no rejoinder seems to have been filed thereto.

Record page 113, 114, 115, 123 and 124.

The testimony of the plaintiff contained in his depositiom read on the trial of the issue on the plea in abatement, and to be found on page

128 and 129 of the Record, offered by the defendant on the last trial, Record page 135, was properly excluded. It was both irrelevant and immaterial and we think was clearly inadmissible under the pleadings. It did not tend to sustain any one of the three remaining pleas of the defendant, and if it proved or tended to prove any thing it was that the plaintiff purchased the bonds before maturity, without notice of any thing affecting or impairing their validity, and for an adequate consideration.

2. The Record in the case of Henry Decker jr. vs. the Town of Grand Chute, offerered in evidence by the defendant, Record page 135 to 151 inclusive, was also properly excluded. This was the record of a suit commenced in the same court on the first of November 1861, by one Henry Decker, jr. against the same defendant, upon some of the coupons described in the declartion in this case, which never progressed to issue and which was discontinued as the Record shows on the 21st of June 1867, nearly three years before the commencement of this suit. That record proved nothing but the fact that Henry Decker jr. at the time of the commencement of that action claimed to own some of the coupons embraced in this suit. Whether he did or not was not in issue in this case, and the testimony was therefore clearly irrelevant and immaterial, and was inadmissible. The court below committed no error in rejecting it.

3. Defendants counsel then offered in evidence the record of an action in the Circuit Court; Outagamie County, commenced about Nov. 17th, 1856, in the name of The Wolf River Branch Plank Road Company, for the use of Henry Hewitt against the defendant, also the record of an action brought in the same court, in the name of the State *ex.rel.*

Henry Hewitt vs. the Board of Supervisors of the Town of Grand Chute, also the record of an action brought in the same court Sept. 9, 1857, by Henry Hewitt, vs. said Town, together with the certified copy of the opinion of the Supreme Court in said last mentioned action, to show the pendency of actions involving the validity of the same bonds and conpons in question in this action, prior to the time this plaintiff is claimed to have become the *bona fide* owner, holder and bearer thereof; Said action showed that the subject matter of this suit was in litigation "before and at the several times when said several actions were pending," *And said actions were discontinued several years before this action was brought.*

This evidence also was excluded.

The records of these several actions are not in the bill of exceptions, neither of them ever progressed to judgment, and it is apparent that neither record tended to sustain either of the pleas of the defendant, or had any relevancy to either of the issues in this case. Hewitt might have owned all the bonds and coupons in 1857, or later, and sought to enforce the past due coupons against the town, and still the plaintiff might, as he did, subsequently and before the commencement of this suit, have become the *bona fide* holder of them, and entitled to protection as such. It does not follow that the bonds were dishonored before maturity, because the town neglected, refused or resisted the payment of interest upon them. The plaintiff was not a party to, or in any wise connected with either of these suits, nor was it pretended that he ever had any knowledge of them. The records of them therefore, were not evidence against him for any purpose. It is respectfully submitted that this evidence also was properly excluded.

4. The defendant also offered in evidence the record of the case of the Town of Grand Chute vs. Geo. W. Winnegar, George B. Goodwin, Henry Hewitt and Theodore Conkey, in the U. S. Circuit Court

fort the Eastern District of Wisconsin in equity, Record p. 152 to 162, inclusive—which on objection was also excluded.

This was a bill in equity, charging, among other things, that the bonds and coupons in question, were fraudulently and illegally issued and that they were owned by Hewett, Conkey, Goodwin and others, unknown, and that the plaintiff had no real interest therein, and praying that the bonds be brought into court and cancelled, and the plaintiff and the other parties who are named as defendants therein, be enjoined from selling, transferring or disposing of said bonds and coupons, and that the plaintiff be enjoined from further prosecuting this suit, and for general relief, no injunction was issued upon said bill, but upon demurrer, it was dismissed. See Record.

This bill was the defendants own statement of the case, made by it, or rather the statement of it made by the counsel of the defendant, and it is difficult to perceive upon what principle, or by what rule of law it was competent evidence for the defendant and against the plaintiff. It was offered by the party whose pleading it was in its own behalf. The bill may be evidence against the defendant, but not in its favor. The demurrer does not admit the facts charged in the bill for the purpose of evidence in another case, "for if it be overruled the defendant may still answer."

1 *Greenleaf's Evidence, sec.* 551, *p.* 682, 683.

The exclusion of this record affords no reason for reversing the judgment below.

5. The defendant offered to read in evidence the resolution of the Board of Supervisors, passed December 1, 1855, directing the Town Clerk not to levy a tax to pay interest on the bonds in question; also the proceedings of a town meeting, held April 1, 1856, instructing the Board of Supervisors "not to pay any interest on Plank Road bonds

until instructed so to do by the people." Record, p. 163. Which testimony was objected to and excluded.

This ruling of the court below was correct and in accordance with the doctrine held by this court.

Mercer Co, vs. Hacket, 1 *Wallace*, 83.
Knox Co. vs. Aspinwall, 21 *Howard* 539, 545.
Meyer vs. The City of Muscatine, 1 *Wallace* 384.

Any action of the Board of Supervisors or of the people of the town subsequent to the issue and delivery of the bonds, could not affect the question of their validity.

6. The evidence offered, relating to the location of the Plank Road, Record, p. 163, 164, the printed notice purporting to have been issued by the President of the Plank Road Company, Record, page 164; the articles of agreement between the contractor and the Plank Road Co., and the receipt thereon endorsed, Record, p. 164; the estimate of the engineer and acceptance of the road after construction, Record, p 165; the evidence offered relating to a change of the location of the road after its construction had been commenced, Record, p. 165; the offer to prove by Conkey that he was a provision dealer and was interested in the contract for building the road, and in the bonds when issued, and was still interested in the bonds; that Smith, the President of the Plank Road Company, received a thousand dollar bond, and Goodwin's letter relating to the discontinuance of the case of Decker vs. The Town of Grand Chute; Record, p. 166; And excluded by the Court, was all obnoxious to the objection, that it was irrelevant, immaterial and inadmissable under the pleadings.

If admitted, it would have shown that $9.000 of the bonds were delivered to the contractor in payment for the construction of the road; that the road was constructed by the contractor at an expense of $10,258.76, and that the work so done by the contractor was accepted by the engineer on the 30th of February, 1857. Such evidence certainly did not tend to impair the validity of the bonds. And the defendant of all others, has least cause to complain that it was rejected.

Besides, the pleadings presented no issue to which this testimony could be applied. In no event could it effect the bonds and coupons in the plaintiff's hands, or his right to recover thereon.

The law authorized the town to subscribe for stock of the Plank Road Co., and to issue bonds in payment. The subscription was made and the bonds issued. The bonds recite that the town was authorized by the act of the Legislature, of the 10th of February, 1854, to make the subscription and issue the bonds. The authority conferred upon the Chairman, by resolution of the Board to make the subscription, and to sign and issue bonds under the seal of the town, and that the bonds were made and issued "for the purpose of carrying out the provisions of the said act of the legislature, and in accordance with the resolution of the said board aforesaid." Apparently a fuller recital than was contained in the Knox County Bonds passed upon by this Court, in Knox Co. vs. Aspinwall, cited above, and in relation to which Mr. Justice Nelson, after quoting the recital, says: "The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of power.

Knox vs. Aspenwall, 21 *Howard*, 539, 545.

7. The exceptions to the instructions given by the court to the jury, and to the refusal of the court to give those prayed by the defendant,

Record, p. 167, present no additional questions requiring discussion. They are covered by the points already made

VIII.

If there remained any possible doubt of the plaintiff's right to recover in this action, we think the doubt was removed by the evidence given by him, to be found on pages 166 and 167, of the Record The plaintiff introduced evidence showing

1. That prior to the issue of the bonds, the question of issuing them was submitted to the voters of the town, and a majority voted in favor of their issue.

2. That the town, after the issue of the bonds, and as late as Aug. 30, 1856, appointed "a Stock Commissioner for the Town of Grand Chute," pursuant to the act of the legislature authorizing the Supervisors of the town to subscribe to the capital stock of the Plank Road Co.

3. That the first issue of bonds were returned and destroyed on account of a supposed informality and new bonds issued in their place, of which those in question are a part

4. The resolution of the board directing the chairman to subscribe ten thousand dollars to the capital stock in payment for which these bonds were issued.

This evidence it is insisted, shows:

1st. That every step required by the law to authorize the issue of the bonds, was regularly taken; That all the conditions to the grant of power were complied with.

2d. That the subscription to the stock of the Wolf River Branch Plank Road Company, and the issue of the bonds, was ratified by the appointment of a stock commissioner, nearly seventeen months after the transactoin, whose sole duty it was to attend the meetings of the stockholders and vote upon the stock held by the town.

H. L. PALMER,

Counsel for Defendant in Error.

APPENDIX.

CHAP. 40. AN ACT TO AUTHORIZE THE TOWNS THEREIN NAMED TO SUBSCRIBE FOR PLANK ROAD STOCK.

The People of the State of Wisconsin do enact as follows:

SECTION 1. The boards of supervisors of the towns of Grand Chute, Greenville, Hortonia, Mukwa, Centreville, Waupacca, Scandinavia, Plover and Stevens Point, or any of said towns, are hereby authorized under the restrictions and conditions hereinafter mentioned, to subscribe in behalf of said towns, or of any of them, to the capital stock of the Wolf River Branch of the Winnebago Lake and Fox River Plank Road Company, such amounts not exceeding ten thousand dollars for any one town, as may be declared by the Board of Directors of said company necessary for the completion of said road at the time of such subscription, and to pay for the same in bonds of the town or towns so subscribing, payable in fifteen years from the date thereof with interest, at a rate not exceeding ten per cent. per annum, payable annually, at such place within or without the boundaries of this State as shall be therein named.

SEC. 2. The board of supervisors of any town so subscribing, and in which such bonds shall be issued, shall annually levy a tax upon the taxable property of such town sufficient to pay the interests upon such bonds, together with the expenses of collecting and paying over the same, after deducting any dividends that may be due to said towns upon said shares of stock so subscribed for by them, and the treasurer of every such town shall collect the said tax, and apply the proceeds thereof to the payment of the interest due on the bonds so issued by said town.

SEC. 3. The shares of stock in said company that shall be issued to any town so subscribing, and all dividends arising therefrom, shall be, by the terms of said bonds, irrevocably pledged for the payment of principal and interest upon said bonds. *Provided*, that the board of supervisors of any town so subscribing, may sell such shares of stock, and apply the proceeds to the payment of interest and principal on the bonds so issued by said town.

SEC. 4. When the principal sum named in such bonds shall become due, the boards of supervisors of each town, so having issued them, shall levy a tax upon the taxable property of such town, sufficient for the payment of such principal sum, with the expenses of collecting and paying over the same. And such tax shall be collected and paid over in the same manner as the tax mentioned in section second of this act.

SEC. 5. The board of supervisors of each town so subscribing, shall annually appoint one Road Stock Commissioner for such town, who shall reside in such town, and shall attend all the annual or special meetings of the stock holders of said company, and shall be entitled to cast one vote for every share of stock which such town may hold in said company; and in case of the absence or inability to attend of any such commissioner, he may appoint in writing under his hand, some other person who shall have the same power.

SEC. 6. No bonds shall be issued by any town in pursuance of this act, unless a majority of the votes cast in said town, at the election hereinafter mentioned, shall be in favor of the same.

SEC. 7. A special election shall be called and held in each of the towns before named, for the purpose of carrying this act into effect within six months after the passage of this act. At such election, those voting in favor of the subsciption of stock, and the issuing of bonds in accordance with the provisions of this act shall put in ballots having inscribed on them the words "For the Road," and those voting against such subsription and issue of such bonds, shall put in ballots inscribed with the words "Against the Road." Notice of such election shall be given for two weeks successively next proceeding said election, in some newspaper printed in the county where the town so voting is situated. And such elections and the canvass thereof, shall be held at the same place, and conducted by the same persons, and in the same manner in all respects as the annual town meetings of each town.

SEC. 8. This act shall take effect from and after its passage.

Approved February 10, 1854. P. and L. Laws of Wisconsin, 1854, page 36.

AN ACT TO INCORPORATE THE WINNEBAGO LAKE AND FOX RIVER ROAD COMPANY.

Be it enacted by the Council and House of Representatives of the Territory of Wisconsin.

SEC. 1. That Albert G. Ellis, William Mitchell, Samuel Ryan, Henry S. Baird, William Dickenson, Erastus M. Drury, Siliver Newton, Francis McCarty and Geo. McWilliams, and such other persons as shall associate with them, and become stock holders pursuant to the provisions of this act, shall be and hereby are created and made a body corporate and politic, in fact and in name, by the name of "The President and Directors of the Winnebago Lake and Fox River Road Company," and by that name they and their associates shall have perpetual succession, and

shall be capable of suing and being sued, pleading and being unpleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, in all matters appertaining to said company.

SEC. 2. The said Company shall have power to construct a plank road from Winnebago Lake to the foot of the Rapids of the Grand Kakalin in Fox River, and the route of said road between the points above named shall be determined by the directors of said company, when elected by the stockholders and duly organized, and they shall have power in their discretion to construct said road along and upon any highway now or hereafter to be laid out, opened and established by the proper authorities, and of such width, and in such manner as the said directors shall determine; and the said tracks, side cuts or turn-outs upon the same may be made of plank, charcoal, stone or timber, or a part of each, or of any other hard material, securely laid, so as to form a smooth and even surface.

SEC. 3. The capital stock of said company shall not exceed the sum of fifty thousand dollars, to be divided into shares of twenty-five dollars each, and shall be transferable in such manner as shall be prescribed in and by the by-laws of the said company, and each stockholder shall be entitled to one vote for each and every share of stock held by them, by proxy or in person

SEC. 4. The business and the concerns of said Co. shall be managed and conducted by nine directors who shall be stockholders, and shall be elected annually on the first Wednesday of December, at such place as a majority of the directors shall appoint and shall hold their office for one year and until others are chosen; and the said directors shall choose one of their number to be their president, and a majority of the said directors shall be a quoram for the transaction of business.

SEC. 5. The said directors, or a majority of them, shall have power to make such by-laws, rules and regulations as may be necessary and proper for the construction and management of said road, and also to appoint such agents and officers as may be necessary to carry out the objects of this corporation.

SEC. 6. The persons named in the first section of this act, or any two of them, shall be commissioners to open books and receive subscriptions to the capital stock of said company, at such times and places as a majority of them may deem expedient; and whenever ten thousand dollars of such capital stock shall be subscribed for and distributed, and ten per cent. paid thereon, said commissioners shall call a meeting of the stockholders of said company by giving two weeks public notice of the same in one or more newspapers published at Fond du Lac and Green Bay, for the purpose of electing the directors of said company, who shall hold the office until the first annual election thereafter; and the directors shall be authorized to call in and require the payment of the balance of the stock subscribed for, in ten per cent. installments, as they progress in the construction of said road, and as the interests of the company may require.

SEC. 7. It shall and may be lawful for said company, their officers, engineers and agents to enter upon any land for the purpose of exploring, surveying and

locating the route of said road, doing thereto no unnecessary damage, nor locating any such route through any orchard, garden, nor through any buildings, or any fixtures or erections for the purposes of trade or manufactures, without permissson of the owners thereof, and when the said route shall be determined by the said company, it shall be lawful for them, their officers, agents, engineers, contractors and servants at any time, to enter upon, take possession of, and use such lands, to the width of four rods; and also to take from any lands adjoining said road, gravel, stone or earth, for the purpose of constructing or repairing said road, subject however, to the payment of such compensation as the company may have agreed to pay therefor, or as shall be ascertained in the manner hereinafter directed and provided.

SEC. 8. Whenever it shall be necessary for the said company to enter upon and occupy, for the purpose of making said road, any land upon which the same may be located, and the owner or owners of said lands shall refuse to permit such entry, or occupation, and the parties cannot agree upon the compensation to be made for any injury that may be done to such land by such entry and occupation, it shall and may be lawful for the parties to appoint three disinterested persons to estimate such damage, who shall take an oath or affirmation, fairly and impartially to estimate the same, and who shall reside within the county where the land lies. The expenses incurred by said appraisers shall be defrayed by the said company, but if the parties cannot agree upon such persons, or if the persons so chosen shall not decide upon the matter, or if the owner of such land shall refuse or neglect to join in such appointment within twenty days after the requisition for that purpose upon him made, or if any such owner shall be under legal disability, or out of the Territory, then it shall be lawful for the district clerk of the county in which such land lies, on application of either party, and at the costs and charges or said company, to appoint three disinterested persons of the said county to view and examine said lands, and estimate the injury or damage, if any, in their judgment will be sustained as aforesaid, by reason of the location of said road, and report the same under oath or affirmation, to the district court of said county, which report being confirmed by said district court, judgment shall be entered thereon. The said viewers shall be entitled to two dollars per day each for their services, to be paid by the said company, in all cases where the damages shall be assessed to a greater amount than the sum that may have been tendered by said company for the use of said land, or be paid by the owner or owners in all cases where the assessed damages shall not be greater than the sum thus tendered; *Provided*, that in case the owner of such land shall be under any legal disabilty, the cost of such assessment shall be paid by said company; and it shall be the duty of the appraisers in estimating such damages, to take into consideration the advantages that may accrue to the owner of said lands from the construction of said road; *Provided further*, that either party may appeal to the said court within thirty days after such report may have been filed in the clerk's office, and such appeal shall be tried as other issues arising in said court.

And provided also that upon payment, or tender of payment of the sum specified in the report of said viewers or appraisers, to the owners of said land, or a deposit of the same for their benefit, with the clerk of the district court of the county in which the land is situated, the said company may immediately take and use the same without awaiting the issue of said appeal.

SEC. 9. The said directors may place toll gates at any place on said road where they may determine: *Provided*, that no full toll gate shall embrace less than ten miles in length of said road; half toll-gates, half that length, or five miles; and in the proportion as aforesaid until such gates shall take in the whole length of said road. Whenever ten consecutive miles of said road shall be completed, it shall be lawful for the said directors to cause a toll gate to be erected, or when five miles shall be constructed, a half toll-gate, discretionary with the said directors at which gates said company may demand and receive for full toll-gates toll not exceeding two cents per mile for every vehicle, sled, sleigh or carriage of any description drawn by two animals; and for any vehicle drawn by more than two animals, one-half cent per mile for every additional animal; for every horse and rider, or for every vehicle drawn by one animal, one cent per mile; for every horse, mule or neat cattle, and half score of sheep or swine, one-half cent per mile. No toll shall be exacted of any person while actually going to or returning from any religious meeting on Sunday, or from any person liable to do military duty while actually going to or returning from any military parade or review at which their attendance shall be by law required. And the toll gatherer at any of said gates erected on said road in pursuance of this act, may detain and prevent from passing such gate any vehicle, carriage or animal subject to toll until the toll thereon is paid.

SEC. 10. Any person who shall willfully break or throw down any gate on said road, which may have been erected in pursuance of this act, or shall do any damage to said road, or forcibly pass any such gates without having paid the legal toll, or to avoid the payment of the legal toll, shall with his or her team, vehicle or carriage, or animal, turn out of said road or pass around such gate, for the purpose of avoiding such toll, and return again on said road, shall for each offense forfeit a sum not exceeding ten dollars to and for the use of said company, and also for all damages of said company, to be recovered by said company in the name of the president and directors of the Winnebago Lake and Fox River Road Company, in an action of trespass, or trespass on the case, according to law,

SEC. 11. The debts and liabilities of said corporation shall not exceed in amount at any one time, fifty per cent of its capital actually paid in, and if debts and liabilities shall at any time be incurred to a greater amount than by this section is provided for, the directors of said company shall be jointly and severally and individually liable for such excess, in addition to their other liabilities at law and as provided for in this act.

SEC. 12. If said company shall misuse or abuse any of the privileges hereby granted, the legislature may resume all and singular the rights and privileges vested

in said company by this act, and may establish rules and regulations for the government of said company in relation to said road and the use of the same.

Approved March 13, 1848. Laws of Wisconsin Territory for 1846–7, page 273.

CHAP. 72.—AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO INCORPORATE THE WINNEBAGO LAKE AND FOX RIVER ROAD CO., APPROVED MARCH 13, 1848.

The people of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SEC. 1. The Board of Directors and stockholders organized under the act of which this is amendatory, are hereby authorized to increase the capital stock of said company not to exceed one hundred thousand dollars, for the construction of a branch extending to the Wolf River, to commence at such point on the Winnebago Lake and Fox River Road and terminate at such point on the Wolf or Wisconsin Rivers as said company may judge best.

SEC. 2. When five hundred shares shall be subscribed for the construction of the Wolf River Branch Road and one dollar paid in on each share, the said company shall be empowered to act, and are hereby authorized to construct said branch under the same regulations, liabilities, restrictions and priviledges as are specified in the act to which this is amendatory.

SEC. 3. Said company is hereby authorized to keep separate books for the Wolf River branch road, and to declare dividends, and all stock issued for the same shall be the stock of the Wolf River Branch of the Winnebago Lake and Fox River Road, and they may have and are hereby authorized to create at their discretion a separate board of directors, and to have a president, secretary and treasurer for the said branch, to be created by the stockholders in said branch, on the same conditions as provided for the creation of the board in the act of which this is amendatory

Approved February 15, 1851. Laws of Wisconsin for 1851, page 54.

CHAP. 16.—AN ACT TO AMEND AN ACT TO INCORPORATE THE WINNEBAGO LAKE AND FOX RIVER ROAD COMPANY.

The people of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SEC. 1. The ninth line of sec. 1, of the act to which this act is amendatory, approved March 13, 1848, is hereby amended so as to read as follows: "Fox River Plank Road Company, and by that name they and their," and the body corporate

created by such act shall hereafter be known by the name of "The President and Directors of the Winnebago Lake and Fox River Plank Road Company."

SEC. 2. Section five of the said act is hereby amended so as to confer upon the said Directors therein referred to, or a majority of them, the additional right and power to fill any vacancy or vacancies that may at any time occur in the Board of said Directors.

Approved February 10, 1853. Laws of Wisconsin for 1853, page 15.

CHAP. 69.—AN ACT TO AMEND AN ACT ENTITLED AN ACT TO INCORPORATE THE WINNEBAGO LAKE AND FOX RIVER PLANK ROAD COMPANY, AND TO CREATE THE WOLF RIVER BRANCH PLANK ROAD COMPANY.

The people of the State of Wisconsin represented in Senate and Assembly, do enact as follows:

SEC. 1. The Board of Directors created by the acts to which this is amendatory and such other persons as are now and shall be associated with them hereafter, and become stockholders pursuant to the provisions of this act, shall be and hereby are created and made a body corporate and politic in fact and in name of "The President and Directors of the Wolf River Branch Plank Road Company," and by that name they and their associates shall have perpetual succession and shall be capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended in all cases and places in all matters appertaining to said company.

SEC. 2. Said company shall have power to construct a plank or turnpike road from Appleton to Stevens Point, on the Wisconsin River, of such width as the board of directors may determine, so as to make a smooth and even surface, of either plank, gravel or charcoal, and such portions as are grubbed and graded without plank. To receive one half toll on the portion graded and not planked and they shall at all times have all the rights and privileges secured in the charter of which this is amendatory. And the board of directors shall be and are hereby authorized to fix the annual election of the said board of directors by the by-laws, on such day as a majority of the board may determine, and all stock issued in said company shall be the stock of the "Wolf River Branch Plank Road," instead of "Wolf River Branch of the Winnebago Lake and Fox River Road Company."

Approved February 21, 1854. P. & L. Laws of Wisconsin for 1854, page 77.